EASTERN & ORIENTAL HOTEL [1951] SDN. BHD.

v.

ELLARLOUS GEORGE FERNANDEZ & ANOR & ANOTHER CASE

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 487 OF 1986]
25 NOVEMBER 1988

CONTRACT: *First respondent alleged he had been induced by false and fraudulent misrepresentations to vacate shop - First respondent was lawful tenant of appellant's shop - Whether alleged oral representation constituted a collateral contract or warranty - First respondent acted to his detriment - Condition precedent - To pay RM170,000 as compensation - Onus of proof of fraud.*

The first respondent was at all material times lawful tenant of the appellant, running a hair-dressing saloon. He alleged that he was induced by false and fraudulent misrepresentations on 28 April 1984 by one Mr. Bala Mahesan, solicitor acting for and on behalf of the appellant, to vacate the shop and that the appellant would pay RM170,000 to him if he would closed down his business and deliver vacant possession on or before July, 1984.

The first respondent contended that the representation made by Mahesan was made falsely and fraudulently and for the purpose of only causing him to close down his business and lock-up the premises so that the appellant could unlawfully break into the premises and take unlawful possession thereof. In the alternative, the first respondent contended that the alleged oral representation made by Mahesan constituted a collateral contract or warranty by the appellant operating as a condition precedent upon the strength of which the first respondent had acted to his detriment. He therefore claimed that the refusal by the appellant the pay compensation for damages amounting to a breach of the term of the collateral contract or warranty so that the condition precedent to his giving up giving possession had failed. He also claimed for exemplary damages.

The appellant denied the allegation and pleaded in the defence that the first respondent had vacated the premises voluntarily because business was poor and that first respondent was in arrears of rental. Consequently he had received a notice to quit on 27 April 1984 and that his closing down of the premises was in compliance with such notice. The appellant also denied that they or their solicitors had promised the first respondent to pay RM170,000 or any sum as compensation. The appeal was against the decision of the High Court, Penang which found for the first respondent and allowed the first respondent's claim.

Held:

[1] The 1st respondent had failed to prove his allegations and that the Supreme Court was satisfied Mahesan, who had acted on behalf of the appellant, did not make the promise to obtain any compensation at all for the first respondent in return for his peaceably quitting and delivering vacant possession of premises; i.e., the so-called collateral warranty.

[2] Bearing in mind that the onus of proof of fraud in Malaysia is proof beyond reasonable doubt, the appeal was allowed with costs.

[Appeal allowed with costs.]

Cases referred to:
Coghlan v. Cumberland [1898] 1 Ch D 704
Bigsby v. Dickinson [1876] 4 Ch D 24
Armagas Ltd v. Mundogas SA. (The "Ocean Frost") [1986] 1 Lloyd's Rep 1
Watt (Thomas) v. Thomas [1947] AC 484
Saminathan v. Pappa [1981] 1 MLJ 121

Legislation referred to:
Evidence Act 1950, s. 114illus.(g)

JUDGMENT

Wan Hamzah SCJ:

The first respondent/plaintiff had alleged that he had been induced by false and fraudulent misrepresentations by Mahesan, solicitor acting for and on behalf of the appellant to vacate a shop where he was running a hair-dressing saloon and of which he was the lawful tenant of the appellant. His claim was for certain declarations and for damages including exemplary damages for fraud.

Briefly, the first respondent alleged that some time in April 1984 the appellant had expressed an intention to obtain vacant possession of the premises earlier mentioned. The appellant then instructed Mahesan to act on its behalf and *inter alia* to negotiate with the first respondent in order to obtain vacant possession. On 28 April 1984 Mahesan allegedly made oral representation to the first respondent that the appellant would pay RM170,000 to him if he would close down his business and deliver vacant possession on or before July 1984. Acting in belief of such representation by Mahesan, the 1st respondent had on or about 30 July 1984 taken steps to close down his business at the premises, whilst retaining possession of the key to the main door.

The 1st respondent contended that the representation made by Mr. Mahesan was made falsely and fraudulently and for the purpose of only causing him to close down his business and lock-up the premises so that the appellant could unlawfully break into the premises and take unlawful possession thereof. In the alternative, the 1st respondent contended that the alleged oral representation made by Mahesan constituted a collateral contract or warranty by the appellant operating as a condition precedent upon the strength of which the 1st respondent had acted to his detriment.

He therefore claimed that the refusal by the appellant to pay compensation for damages amounted to a breach of the term of the collateral contract or warranty, so that the condition precedent to his giving up vacant possession had failed.

He also claimed for exemplary damages.

The substance of the defence was that the 1st respondent had vacated the premises voluntarily because business was poor. The appellant had stated in his defence that the 1st respondent was in arrears of rental in consequence of which he had received a notice to quit on 27 April 1984 and that his closing down of the premises was in compliance with such notice. The appellant also denied that it or its solicitors had promised the 1st respondent to pay RM170,000 or any sum as compensation. We agree with Raja Aziz that the main issue before the Judge is:

(1) whether the alleged false and fraudulent misrepresentation has been made by appellant's solicitor - Mahesan - and in that connection whether the 1st respondent was induced thereby to vacate the premises, and

(2) depending on this Court's view of the representation, whether there had been a collateral contract or warranty.

Since the representation was oral the reasons for preferring the evidence of 1st respondent to that of Mahesan, added Raja Aziz, was of great importance.

It is trite law that an appellate Court would in appropriate cases act upon its own view of conflicting evidence (see *Coghlan v. Cumberland* [1898] 1 Ch D 704 and *Bigsby v. Dickinson* [1876] 4 Ch D 24, and it was argued on behalf of the appellant that the Judge had overlooked certain evidence which might otherwise have caused him to come to a different finding.

We would respectfully agree with the soundness of the observation made in *Armagas Ltd. v. Mundogas SA* (*The "Ocean Frost"*) [1986] 1 Lloyds Rep 1 which reads:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witness' motives, and to the overall probabilities can be of very great assistance to a Judge in ascertaing the truth.

In commercial cases there is usually a substantial body contemporary documentary evidence. This is not strictly speaking a commercial case, but the relevance of contemporaneous documents nevertheless holds true. The first of such contemporaneous documentary evidence is lawyer Rajasingam's letter. This letter is date 8 August 1984, the date of the third meeting between Mahesan and the 1st respondent.

1st respondent's affidavit shows that he had gone to complain his treatment by Mahesan earlier that day. He claims to have told Rajasingam everything including the promise by Mahesan to get him paid RM170,000, to take Court action and to reply to the notice to quit.

Yet Rajasingam's letter did not refer to anything other than the notice to quit. In addition there is the fact that the 1st respondent did not call Rajasingam, as one could expect him to do to substantiate his allegations. The presumption under s. 114(g) of the Evidence Act against the 1st respondent is something we would think is unavoidable in the circumstances, i.e., that Rajasingam, if called, would give evidence unfavourable to the 1st respondent.

Our attention was drawn to the insistence of the 1st respondent under cross-examination that his instructions to commence an action "for the RM170,000 which Bala Mahesan had promised me".

It seems to us that the 1st respondent's reluctance to admit that he was aware all the time that Mr. Rajasingam's letter to Mr. Mahesan had been confined to the notice to quit would give rise to the inevitable conclusion that his instructions to Rajasingam had been confined to that issue only, and cast grave doubts on the truth of his other allegations.

That the learned trial Judge had failed to attach appropriate significance to the fact that Rajasingam had failed to deal with the more significant parts of the 1st respondent's alleged complaints against Mahesan is borne out by his brief and only reference to this incident in his grounds to the effect that the 1st respondent had consulted Rajasingam who gave a formal reply to Mahesan's notice to quit.

One cannot avoid concluding that the failure by Rajasingam to refer to the more serious undertaking by Mahesan to obtain a substantial sum in compensation was because there had been no such complaint from the 1st respondent, a complaint which he would unquestionably have made soon after what he described was a traumatic meeting with Mahesan. The next contemporaneous item which the learned Judge ignored, it was submitted,

was the difference between what the 1st respondent alleged in his report to the police and his evidence-in-chief. Under cross-examination he admitted that most parts of police report "was incorrect". In short most of the report was in contradiction to the salient points of his case. Of special interest is the fact that in the police report there was no mention that Mahesan had promised "to get RM170,000 form E & O" to pay him, or had assured him that E & O would pay him that sum.

Instead, in the police report he said that he had been asked by Mahesan how much he wanted as compensation for leaving the barber's shop and he (the 1st respondent) had asked for RM170,000. His demand in the report had by some process of wishful thinking become a promise to pay that sum by Mahesan. Was Miss Shyama present at the first meeting between Mahesan and the 1st respondent? The learned trial Judge dealt with this aspect of the evidence at some length in his grounds of judgment, rejecting her claim to have been present at the first meeting and accepting the 1st respondent's assertion that she was only present at the third and final meeting. His Lordship remarked that she was introduced into the scheme of things so as to corroborate Mahesan's evidence of the happenings at the crucial first meeting.

There can be no doubt of the time that the 1st respondent's third visit was in the morning, about 10.20 a.m. according to Mahesan's minutes, whereas the first visit was in the afternoon at about 4.00 p.m.

That Shyama was not back in her office until after 11.30 a.m. on the date of the third meeting is borne out by irrefutable evidence, the Magistrate Court's judgment of 8 August 1984, which corroborated her evidence that she was in the Butterworth Court at 10.30 a.m. The third meeting could not have taken more than 30 minutes, certainly, not until 11.30 a.m. It probably was very brief indeed for even the 1st respondent's account was that he was practically shooed off.

Raja Aziz indicated certain other bits of evidence which would tend to confirm Miss Shyama's testimony that this first meeting had taken place in her room. The 1st respondent said that he and Mahesan were seated on the same side of the table, which would have been indeed strange had they been in Mahesan's room. Mahesan gave evidence to the same effect saying that he was seated with 1st respondent on his left with Miss Shyama opposite them.

It is significant that this account came out whilst the 1st respondent was under cross-examination. The damaging effect of this admission must have dawned upon him suddenly for shortly after he retracted his admissions and claimed instead that he was seated opposite Mahesan.

We were also invited to draw appropriate inferences from the damage to the premises. Even the 1st respondent would not deny that the premises he had left behind was in a chaotic state with one broken washbasin and damaged ceiling. The 1st respondent claimed that he had only been trying to remove things which he had originally installed.

That the 1st respondent was not running a thriving business can hardly be disputed. Apart from Hepworth's observation on his general lack of custmors, even the 1st respondent admitted that his average monthly earnings was RM400 a month.

Then there is the undeniable fact that he was often in arrears of rent for which he received notices from time to time.

Would the state in which he left the premises not tend to confirm that he had left in a state of considerable distress, under pressure from the appellant, rather than a willing departure with rosy expectations of receiving generous compensation which had been promised?

The correspondence between Mahesan and the appellant is further support for the version which the appellant has throughout contended is the true version i.e., a demand for the RM170,000 on 30 April 1984, his letter seeking instructions from appellant and his prompt advice to take eviction proceedings.

This exchange of letters would show that there was perhaps negotiations with 1st respondent making the demands, but by no stretch of the imagination can it support his allegation of a promise to pay.

We were then referred to the comments made by the learned Judge in his Grounds of Judgment to the effect that he found that the third meeting of 8 August 1984 was a follow-up upon the previous visit (i.e., the second meeting), where the 1st respondent wanted to know when he could get the compensation, and his utter surprise to be told for the first time the sum demanded was unreasonable.

Would the Judge have come to the same conclusion had he given due regard to the 1st respondent's admission that he had been asked to see his own lawyer when he came to see Mahesan at the first meeting, but had chosen not to do so? Would this insistence by Mahesan not be more consistent with the appellant's case that they had just served a notice to quit to the 1st respondent and had no inclination to negotiate on compensation. We are inclined to agree that this is yet another factor which should incline us to the view that Mahesan's version is the true one.

It is clear from the grounds of judgment that the learned trial Judge regarded the question of whether the 1st respondent was indeed in arrears of rent at material time (for March and April 1984) of great importance out of which arose his opinion that the notice to quit (AB13) "was just a device thought of by DW1 (the assistant manager) to get the plaintiff to agree to some form of compensation ...".

In his grounds of judgment he said, "In fact, it was shown in evidence that the plaintiff was never in arrears of rental for March 1984".

That receipts were issued for rent is not in dispute. This explains the 1st respondent's anxiety to impress upon the Court that his receipts had been kept in the shop, which was forcibly broken into. (See his reply in cross-examination).

However the learned Judge had failed to note the tenancy agreement the 1st respondent entered into with the appellant wherein rent was agreed to be payable **in advance.**

It would therefore appear to us that for the foregoing reasons, on the all important issue of credibility we should apply the third of Lord Thankerton's principles as stated in *Watt (Thomas) v. Thomas* [1947] AC 484, 487- 488 which we set out: "III The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court."

Having taken the view of what happened at the meeting between Mahesan and the 1st respondent on 30 April 1984 (the first meeting) all we need say is that the 1st respondent had failed to prove his allegations and we would even go further and say that we are satisfied

that Mahesan did not make the promise to obtain any compensation at all for 1st respondent in return for his peaceably quitting and delivering vacant possession of the premises (as alleged in para. 6 of re-reamended statement of claim, i.e., the so-called collateral warranty).

Bearing in mind that the onus of proof of fraud in Malaysia is proof beyond reasonable doubt (see *Saminathan v. Pappa* [1981] 1 MLJ 121 we would therefore allow this appeal with costs here and in the High Court. The claim of the 1st respondent/plaintiff is dismissed. The High Court's order that the costs of the second defendant be paid by the first defendant is set aside and we order that the costs of the second defendant in the High Court be paid be 1st respondent/plaintiff. The cross appeal is dismisses with costs.

Also found at [1988] 2 CLJ 734